

# The CURE

## Contract User's Resource for Excellence

*The "CURE" is a quarterly newsletter of the State Controller's Office*

Volume 6, Issue 2

May 2000

### News From The SCO

#### A State Controller's Office Update

*By John Ivy, SCO*

##### ⇒ CCIT Meeting

The May CCIT Meeting will be somewhat of a change from our past meetings. The decision was made to hold the meeting in conjunction with the semi-annual Procurement Advisory Council (PAC) meeting. Since both the CCIT and PAC are concerned with improving procurement, it seemed to be a logical mix. The meeting will be held on Thursday, May 11th in Room L-211 in the College Hill Library Building of Front Range Community College. The college campus is located between Federal and Sheridan Boulevards and between 112th and 120th Avenues. The address is 3645 West 112th Avenue. Parking is available at the light on 112th Avenue, near the library. Registration begins at 8:00 and the joint meeting will get underway at 8:30.

##### ⇒ Two New SCO Contract Policies

The state controller adopted two new policies to improve the state contracting process and give delegated state agencies and institutions more flexibility in approving low dollar contracts and late federal grant contracts.

Effective April 14, 2000 the new state controller policy, *Executing State Contracts with a Value of No More than \$25,000*, was adopted. This policy eliminates the requirement to have a legal sufficiency review performed on every state contract by the Attorney General's Office or a designated Special Assistant Attorney General. For contracts within the thresholds established by and consistent with the limitations of the policy, the contract can be executed by the State Controller delegate without a formal legal review.

Effective April 21, 2000 the new state controller pol-

icy, *Federal Sub-Recipient Grant Contracts*, was adopted. This policy was developed to simplify and expedite the approval process for federal sub-recipient grant contracts and give the state controller delegates the authority to execute late federal sub-recipient grant contracts, under certain conditions.

##### ⇒ State Fiscal Rule Waiver Requests

If you need a State Fiscal Rule waiver, please remember that the request **must** come from the CFO with notification to the CEO to the state controller. If this procedure is not followed, review and approval of the request may be delayed.

### Central Approvers Names and Numbers

NAME	PHONE #	FAX #
<b>State Controller's Office</b>		
Contracts:		
Phil Holtmann	303-866-3809	303-866-3569
Fiscal Rule Waivers and Statutory Violations:		
John Ivy	303-866-3765	303-866-3569
Privatization Program:		
Yvonne Anderson	303-866-2862	303-866-3569
Distribution and E-mail Updates:		
Kevin Cruise	303-866-2127	303-866-3569
<b>Attorney General's Office:</b>		
David Kaye	303-866-5142	303-866-5671
Rod Wolthoff	303-866-5027	303-866-5671
<b>State Buildings and Real Estate Programs:</b>		
Carol Lieber (SBP)	303-866-3158	303-894-7478
Bob Marshall (REP)	303-866-2208	303-866-4367
<b>State Purchasing:</b>		
Kay Kishline	303-866-6181	303-894-7444
Jane Lopez	303-866-6146	303-894-7478

**NOTE:** You may e-mail any of the above by using the following format: **firstname.lastname@state.co.us**

## Processing Fiscal Year End Contracts

*By Phil Holtmann, SCO*

Agencies should be well aware of the circumstances that constitute a statutory violation. A statutory violation arises when an obligation has been incurred by an agency or when an agency makes a payment to a vendor without a **valid** commitment voucher being in place. This means that if a vendor performs work before the end of the fiscal year and the contract is not routed to the central approvers until after work has begun you have violated state statutes. When this occurs with a contract, the chief financial officer, through the chief executive officer, must investigate the circumstances surrounding the violation and prepare a written document explaining the circumstances to the state controller. Contracts that violate state statutes will not be executed without this formal explanation.

This means that all contracts for fiscal year 99-00 that arrive at the SCO after June 30, 2000 will automatically be placed in this category. Be aware that all contracts that arrive at the SCO towards the end of the current fiscal year will be closely examined for start dates and the reasonableness of the amount of work that can be accomplished by the contractor before fiscal year end. If you are aware of a situation where a statutory violation has occurred or is going to occur, you should inform your state agency or institution's chief financial officer so that the required formal response can be prepared for the state controller in compliance with the SCO policy, Managing Contracts that Violate State Statutes, dated July 12, 1999.

One way, if appropriate, to avoid this situation altogether and use fiscal year 99-00 spending authority to pay a vendor is to ask your chief fiscal officer to request a rollforward of the spending authority. Requests for rollforward are sent to the appropriate Field Accounting Services Team member in the SCO. If the rollforward request falls within the established guidelines it is recommended for approval by the FAST and forwarded to the state controller for review and approval. A rollforward will allow you to receive and pay for the services in fiscal year 00-01 using fiscal year 99-00 funds, once the contract has been executed.

## Farewell Chris Trujillo

### The SCO State Contract Unit Has a Vacancy

**Chris Trujillo**, after more than a dozen years of reviewing and approving state contracts for the State Controller, left the SCO Contract Unit for greener pastures, or should I say for camouflaged pastures. Chris has accepted a position in the Department of Military Affairs where it is difficult to find the people you are looking for because of the camouflaged uniforms they wear. She will be working in procurement. The knowledge and experience gained in the SCO will enable Chris to assist the State Adjutant General in providing a well equipped militia for the state to respond to emergency situations at a local or national level. The state controller and his staff wish Chris the best in her challenging new position. Chris, we miss you.

### GENERAL PROFESSIONAL II

The SCO is looking for someone with experience in reviewing and processing state contracts to work in the State Contract Unit with Yvonne Anderson and Phil Holtmann to assist in executing state contracts. The GP II position requires a bachelor's degree and one year of professional experience working with contracts. As with most civil service positions, additional years of experience may be substituted for the required degree on a year for year basis.

We will consider downgrading the position for training to a GP I level with the possibility of a promotion to a GP II after the probationary/training period. If you are interested in the position, please contact either Phil Holtmann at 303-866-3809 or John Ivy at 303-866-3765 to discuss your qualifications and set up an interview. The position will also be announced open-competitive as soon as the necessary paperwork is completed.

# Assignments, Novations, and Change of Name

*By Richard Pennington, SPO*

The State Purchasing Office recently received the following inquiry about vendor assignment of payment on a purchase order.

After a bidding process and issuance of a purchase, a representative of the successful bidder telephoned a representative of our agency to indicate that the name of the vendor should be changed on the purchase order. No other change (in the address, for instance) was requested. While he made it sound as though this was a technical name change, it wasn't at all. We made the change, but as it turned out, the change was the addition of a supplier with whom the vendor had a separate agreement that payments would be made jointly to the two. We paid the successful bidder using the original name, the vendor kept all the money, and we ended up being sued by the supplier for non-payment. The message which I think needs to be shared with folks is that changes in purchase orders shouldn't be made lightly, certainly not just based on a phone call, and perhaps not at all.

This situation involves the potential issues that arise with vendor name changes, assignments, and novations. Unfortunately, this purchase was made prior to the revision of the purchase order terms and conditions, paragraph 13 of which would have defined the assignment process and better protected the State. You are encouraged also to read Chapter 10, sections 4.7 and 5 of the *Colorado Contract Procedures and Management Manual*. SPO recommends that agencies not take any action without at least some written documentation that establishes the basis for any changes.

## Assignments vs. Subcontracting

An assignment of payment (or "accounts receivable") by a vendor is a common method used in financing. Occasionally, a financial institution will require the vendor to assign the right to receive payment as part of a financing transaction. The assignment of a right to payment is usually distinguished from "subcontracting," where the performance obligation is being "assigned" through an agreement between the contractor and subcontractor. While the State often does have an interest in approving who is doing the work, there is less interest in approving which contractor actually receives the payment for work. Still, a vendor assignment of payment carries specific rights for the assignee and obligations by the State. Paragraph 13 of the revised purchase order says that "Assignment of accounts receivable may be made only with written notice furnished to the purchasing agency or institution." This is intended to get the assignment terms in the hands of the purchasing agent for proper processing.

Similarly, the assignment clause in the Colorado Contract Procedures and Management Manual was changed in 1999 to address the procedural requirements for assignments on State contracts:

The contractor agrees not to assign rights or delegate duties under this contract without the express, written consent of the State. . . . This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller - as distinguished from the State Controller - and the contractor assumes the risk that such written notice of assignment is received by the controller for the State agency, department, or institution involved.

Proper processing of assignments is extremely important. As in our fact situation described above, a failure to properly process an assignment may result in a payment to the wrong entity. Such an improper payment can subject

## Assignments, Novations, and Change of Name

an agency to double liability for payment, especially if the original vendor ultimately becomes insolvent or goes into bankruptcy.

All assignments must be signed by an authorized representative of the original contractor, in order to insure that the original contractor assents to the assignment of payment. Then, make sure that the assignment is promptly processed so no payments are made inconsistent with its terms.

In the example above, two vendors apparently had an "assignment" agreement that required issuance of joint warrants. Treating this simply as a "change of name" did not avoid the problem of issuance of payment inconsistent with the terms of an assignment. The agency should have clarified the situation by requiring a written document showing the exact terms of the assignment. In this case, a "joint warrant issuance" requirement might have been outside the scope of CRS 4-9-318 and capabilities to issue payment consistent with its terms. We recommend your obtaining the advice of servicing legal counsel in questionable cases.

### Change of Name

A change of name does not change the identity of a legal entity. Again, insure that there is documentary evidence such as an amendment to the articles of incorporation or other documents filed with the Secretary of State's Office showing the change. A simple change of name does not raise "assignment" issues, because the identity of the contractor's legal entity has not changed, only the name. In the example above, there really was no change of name. The vendors were asking for joint warrant issuance, more in the nature of an assignment.

### Novations

A novation is an agreement between the State and contractor permitting another contractor to step into the shoes of the original contractor. It is more than a consent to subcontract, because the intent is to substitute the second contractor for the first in the obligation remaining on the contract. A change in the payee is typically one of the results of the novation;

the "transferee" assumes all future liability for performance, and the State is then obligated to pay the transferee. Section 4.7 of the Contract Procedures and Management Manual has a model novation agreement.

The typical novation has the signature of three parties: the original contractor (transferor), the contractor assuming the obligations (the transferee), and the State agency or institution. Occasionally, after a merger or other acquisition, there may be no "transferor" in existence. SPO recommends that the original contractor's authorized officer still sign on behalf of the transferor, if possible. If not, then in the WHEREAS or factual recitals, state the existence of the merger or acquisition, attach the documentary evidence of the merger or acquisition to the novation agreement, and have only the acquiring contractor sign the agreement.

### Guidance for Users

Because state agency and institution users are often the points-of-contact in contract administration, they should be advised to forward to the Purchasing Office immediately any correspondence or documents that appear to show a change of name, merger/acquisition, or other assignment of rights under purchase orders and contracts.

### Key to CURE Abbreviations

Attorney General's Office	AGO
Central Approvers Task Force	CATF
Colorado Contract Improvement Team	CCIT
Division of Finance and Procurement	DFP
General Support Services	GSS
State Buildings and Real Estate Programs	SBP
State Contract Unit	SCU
State Controller's Office	SCO
State Purchasing Office	SPO

# Signature Authority

*By Rod Wolthoff, AGO*

Since all contracts involve a relationship between two or more parties, it is necessary to insure that the contract is a legally enforceable binding commitment among the parties. One aspect for insuring enforceability is to insure that those persons who sign the contracts have the authority to bind the parties. The State contracts with various types of legal entities, each enjoying a different legal status. Some examples include sole proprietorships, local governments, special districts, general and limited partnerships, profit and non-profit corporations, municipal corporations, etc. Contractors work through individuals called "agents", such as the president of a corporation. The primary issue becomes who can bind the organization.

Where the State is contracting with a single individual or sole proprietorship, that individual must sign and include his/her SSAN. A common problem is when the State contracts with an individual who is an employee of an organization such as a law firm. Often there is a question as to which the State is contracting with, the person or the organization.

Where the State is contracting with other legal entities, the statutory provisions creating the legal entity often dictate the provisions governing the authority to contract. For corporations, the power generally resides with the Board of Directors who can delegate the power by resolution. There is often a presumption that the President and Vice-Presidents have implied authority to bind the corporation. In addition to their signatures, the State requires the corporate seal or attestation by the corporate secretary and the FEIN.

There are similar requirements for other legal entities. For partnerships, all general partners have the implied authority to bind the business. Limited partners do not share that same kind of implied authority. Once again the State requires the FEIN. For Limited Liability Companies (LLC), one of the managers should sign. For Local governments, a member of the City Council, Mayor, or City Manager should sign accompanied by the official seal. Counties are governed by a Board of County Commis-

sioners who have authority to sign contracts. The County Seal should also be attached. Where there are Special Districts, it is wise to examine the legislative authority creating the District to determine contracting authority.

Where there is doubt as to whether the individual has the proper authority to sign on behalf of the organization, don't hesitate to ask for the source of authority. A corporation should produce either articles of incorporation, by-laws or a resolution from the Board of Directors. Similarly, local governments should produce a statute, charter, Board resolution, or ordinance.

For a more detailed discussion on this subject, refer to Chapter 6, Colorado Contract Procedures and Management Manual.

## E-MAIL

### ADDRESSES ARE IMPORTANT

The extended use of personal computers by state agencies and institutions has enabled for better and faster communications throughout the state. In order to take advantage of this fact, the SCU has developed and will maintain an e-mail listing of all CCIT members. The purpose of this CCIT distribution group is to distribute information in a more timely manner.

The two new SCO contract policies and the CCIT meeting notice were distributed using this e-mail list. If you did not receive copies of the policies or the notice for the CCIT meeting electronically, please contact Kevin Curise at 303-866-2127. Better yet, e-mail Kevin at:

**kevin.cruise@state.co.us**

By e-mailing Kevin, he will have your correct e-mail address and can update the CCIT group.

**General Support Services  
Division of Finance and Procurement  
Office of the State Controller  
State Contracting Unit  
1525 Sherman Street, Suite 250  
Denver, CO 80203  
Phone: 303-866-3281  
Fax: 303-866-3569**



## **CCIT Breakout Discussion Topics**



### **CCIT Breakout**

Thursday, May 11, 2000

Front Range Community College – Westminster Campus  
College Hill Library – Lower Level Breakout Room

#### **Discussion Topics**

During the forty-five minute breakout session the CCIT members will meet in the lower level conference room to discuss topics of interest to CCIT members.

#### **Among the topics identified are:**

- ⇒ Funding Source and Funding Code on face of state contracts
- ⇒ *State's Special Provisions* – Update and tailor for specific contracts
- ⇒ Contract Policies – Are additional policies needed?
- ⇒ Your Input

### **On the World Wide Web at :**

**[www.sco.state.co.us/](http://www.sco.state.co.us/)**

**CONTRACT PROCEDURES AND MANAGEMENT  
MANUAL  
[contract/contract.htm](http://www.sco.state.co.us/contract/contract.htm)**

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